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No. 97-42

In The

Supreme Court of the United States

October Term, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

KENNETH S. APFEL,
Commissioner of Social Security, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL COMPANY, CENTRAL COAL COMPANY, CENTRAL OHIO COAL COMPANY, PRICE RIVER COAL COMPANY, SOUTHERN APPALACHIAN COAL COMPANY, SOUTHERN OHIO COAL COMPANY, AND WINDSOR COAL COMPANY IN SUPPORT OF RESPONDENTS

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SUMMARY OF ARGUMENT

Amici curiae Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Coal Company [collectively referred to as "AEP Coal Companies"] submit this brief in support of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722 (1992), and the Coal Act's method of assigning coal industry beneficiaries to coal operators. The AEP Coal Companies believe that the Coal Act lies within the bounds of constitutional authority granted to Congress under the Commerce Clause because it: rationally regulates national economic policy by bringing stability to the coal industry, rationally recognizes that the conduct of companies such as Petitioner creates in coal industry employees a reasonable expectation of continuing health care benefits, and rationally assigns beneficiaries to responsible companies based primarily on their employment relationships within the coal industry.

Inasmuch as these factors are consistent with factors favoring constitutionality found in the Court's analysis of similar legislation in both *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), and in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court should defer to the judgment of Congress and the executive branch, and hold that the method of assigning beneficiaries to coal industry companies under the

Coal Act violates neither the Due Process Clause nor the Takings Clause of the Fifth Amendment[1].

STATEMENT OF INTEREST OF AMICI CURIAE

Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Coal Company [collectively referred to as "AEP Coal Companies"] are subsidiary corporations wholly owned by utility operating companies, in turn, owned by American Electric Power Company a public utility holding company established pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6. The AEP Coal Companies executed either the 1974 and 1978 National Bituminous Coal Wage Agreements and/or they executed Coal Wage Agreements subsequent to the 1978 Agreement. These coal companies have paid nearly $5 million in health benefit premiums for retired miners since the passage of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). 26 U.S.C. §§ 9701-9722 (1992). Additionally, the AEP Coal Companies anticipate paying over $6 million in future health benefit premiums for retired miners who were employed by now inactive AEP

[1] Each party has consented to the filing of this brief. Their written consent is included with this brief. Sup. Ct. Rule 37.3(a).

No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. This brief was not authored in whole or in part by counsel for a party. Sup. Ct. R. 37.6.

Coal Companies. The Court's determination of the constitutionality of the Coal Act can directly impact the AEP Coal Companies' reasonable expectations of their obligations under the Coal Wage Agreements and the Coal Act, affect the price of coal in the future and consequently affect the customers of AEP, as well as the customers of other electric companies which use coal as a fuel.

ARGUMENT

I. THE COAL ACT IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY THAT CONTINUES AN EFFORT TO PROTECT EMPLOYEE RETIREMENT BENEFITS.

In 1992 Congress concluded an investigation into the state of the private health care benefits program in the coal industry and found that:

> [I]n order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities*[2] in order to secure plan funding and allow for the provision of health care benefits to such retirees.

Pub L. No. 102-486 § 19142(a)(2) (emphasis added).

[2] While not central to amici AEP Coal Companies' argument, Petitioner claims that the emphasized language shows Congress intended to identify those parties most responsible for the failure of the private benefit plan. *Brief of Petitioner at 27.* Petitioner offers no support for this interpretation, and such an interpretation conflicts with the plain language of the congressional findings.

In response to these findings, Congress, acting pursuant to the constitutional authority granted to it under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722 (1992). The Coal Act was but the next logical step in a series of legislative efforts to stabilize and protect employee benefits. Most notably, in 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). 29 U.S.C. §§ 1381-1405 (1980). The MPPAA, just as the Coal Act is today, was challenged on both Fifth Amendment Due Process and Takings Clause grounds. The Court addressed the Due Process Clause challenge in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), and the Takings Clause challenge in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). In both instances the Court upheld the constitutionality of the MPPAA. Today the Court is asked to again cover much of the same ground with respect to the constitutionality of the Coal Act.

II. PETITIONER'S CONDUCT CREATED THE EXPECTATION THAT BENEFITS WOULD NOT BE TERMINATED AND JUSTIFIES PETITIONER'S LIABILITY FOR THE HEALTH CARE COSTS AT ISSUE.

Petitioner and its wholly owned subsidiary, Eastern Associated Coal Company, acted in such a way as to create the expectation that health care benefits would not be terminated. Petitioner signed the 1950 National Bituminous Coal Wage Agreement establishing health care benefits for coal industry employees. Petitioner signed

later Coal Wage Agreements that continued those benefits. Eastern Associated signed the 1974 and 1978 Coal Wage Agreements that formally made health care benefits permanent. Petitioner's actions, taken together with Eastern Associated's conduct, served to create the expectation that health care benefits would not be terminated.

A. Petitioner's Reliance On The Concurring Opinion In *Connolly* Is Misplaced.

Although the Court, in a unanimous decision, upheld the constitutionality of the MPPAA against a Takings Clause challenge in *Connolly*, Justice O'Connor, in discussing the MPPAA's imposition of liability on contributing employers for unfunded benefits that accrued in the past, counseled:

> Our recent cases leave open the possibility that the imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat employees' expectations of benefits under the plan as the employer's responsibility.

Connolly, 475 U.S. at 229 (O'Connor, J., concurring).

While it remains to be determined whether benefits legislation is arbitrary and irrational absent a nexus between employer conduct and employee expectations, amici curiae AEP Coal Companies write to address the issue of employer conduct and employee expectations considered by Justice O'Connor, in *Connolly*, and to show that Petitioner's past conduct provoked the rational

expectation in former employees that they would receive the benefits now guaranteed by the Coal Act.

B. Petitioner's Conduct Created A Reasonable Expectation That Benefits Would Continue.

It should come as no surprise to Petitioner that the Coal Act holds Petitioner accountable to fund certain retirement benefits. One need only review Petitioner's conduct to see that the expectations of its employees that health benefits would not be terminated relates rationally to Petitioner's business conduct over a period of almost forty years.

Petitioner was an early participant in the plan to establish health benefits for miners. Petitioner signed the 1950 Coal Wage Agreement and signed later agreements up until the time in 1966 when it transferred its coal industry operations to its wholly owned subsidiary Eastern Associated. *Eastern Enterprises v. Chater*, 110 F.3d 150, 154 (1st Cir. 1997). The 1950 Agreement, in return for concessions related to mechanization, created a welfare and retirement fund for mine employees. *Id.* at 153. Between 1950 and 1974 subsequent Coal Wage Agreements were signed. None of those agreements modified the basic structure of the 1950 plan. *Id.* The 1974 Coal Wage Agreement guaranteed lifetime health benefits to enrolled miners. The 1978 Coal Wage Agreement extended the guarantee of lifetime health benefits to those "orphaned" miners whose employers had abandoned the coal industry. *Id.*

Until selling Eastern Associated to Peabody Holding Company in 1987, Petitioner was Eastern Associated's

parent and sole stockholder. Petitioner received dividends totaling more than $100 million from Eastern Associated. *Brief for Petitioner at 6, note 13.* From 1966 through 1987 Eastern Associated was a signatory to the Coal Wage Agreements, including the 1974 and the 1978 Agreements. *Brief for Petitioner at 7.* Petitioner's holding of Eastern Associated's stock, its receipt of dividends derived from Eastern Associated's mining operations, and the similarity in name of both organizations inextricably link Petitioner with Eastern Associated. *See generally, Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic and Commerce Ass'n*, 247 U.S. 490 (1918) (discussing conduct leading to conclusion that subsidiary corporation was an agent of its parent); *18 Am. Jur. 2d, Corporations § 59 (1985)* (factors tending to show control of subsidiary by parent). As a wholly owned subsidiary, Eastern Associated was controlled by Petitioner. Moreover, Petitioner accepted the benefits of its arrangement with Eastern Associated for nearly twenty years. This lengthy, linked relationship belies Petitioner's efforts now to interpose Eastern Associated as a shield of constitutional significance, particularly when considered with the reality of reasonable coal miner expectations.

C. Miners' Expectation Of Continuing Benefits Was Reasonable In Light Of Petitioner's Conduct.

The miners' expectations of lifetime benefits can be traced to Petitioner's conduct as a participant in the Coal Wage Agreements. The 1950 Coal Wage Agreement created the welfare and retirement plan that the miners

worked under until the plan was modified in 1974. *Eastern*, 110 F.3d at 153. During this period, although the contract language expressed that benefits were subject to termination at any time, *Brief for Petitioner at 5*, the structure of the plan remained unchanged. As a result, while there may have been textual support for an argument that the benefit plan could be terminated, there was little, if any, threat that termination would occur. Instead, the plan continued basically unchanged for more than a generation.

As the years passed with the benefit plan being continued in each subsequent Coal Wage Agreement, it is reasonable to expect that the miners came to view the benefit plan as certainty rather than the mere illusion Petitioner would have the Court accept. Petitioner chose to participate in the Coal Wage Agreements and enjoyed their benefits, including labor harmony, and as such, worked to create the belief in the minds of the miners that the retirement benefits would continue. While Petitioner now attempts to hide behind the formalities it imputes to the contract language, that language binds neither the Court nor Congress. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."). The Court certainly is free to, and should, look beyond the mere language parroted in successive Coal Wage Agreements to the course of dealing between the parties. With this view, it becomes clear that there was no real threat that the benefit plan would be terminated, and that the expectation of the miners that health benefits would not be terminated was reasonable.

D. The 1974 National Bituminous Coal Wage Agreement Merely Formalized What Was Already A Reality, While The 1978 Coal Wage Agreement Took The Next Logical Step.

While Petitioner points to the 1974 and 1978 Coal Wage Agreements as being key to establishing liability for funding the health care plan, *Brief of Petitioner at 30*, in reality those agreements did little to change what was already in place and being relied upon. The 1974 Coal Wage Agreement granted lifetime benefits to all enrolled miners. *Eastern*, 110 F.3d at 153. In effect it eliminated the language found in previous Coal Wage Agreements regarding termination of benefits. While on the surface this appears to be a significant change, in actuality it only formalized that which was already established informally. The benefit plan of the 1950 Coal Wage Agreement had remained unchanged since its inception. *Id.* Benefits were renewed with each Agreement. The nearly twenty-five years of ongoing conduct, by both employers and employees, reasonably compels the conclusion that both parties accepted this arrangement as a permanent part of the Coal Wage Agreement. By agreeing to the 1974 revision, the miners received formal recognition of what they had come to expect informally; namely, that the benefit plan would continue. The coal operators gave up little in return since they only formalized a plan that was already in place. Therefore, the only true change in the benefit plan resulting from the 1974 Coal Wage Agreement was to commit reality to writing.

The 1978 Coal Wage Agreement went a step beyond the 1974 revision, but it was a step that was within the reasonable expectations of both parties. With the 1974

Agreement guaranteeing lifetime benefits to all enrolled miners, the time was ripe to extend the same guarantee to those miners who had retired from the industry earlier. A primary goal of labor negotiations is to improve conditions for those represented. Therefore, it is unreasonable to believe that in 1978 the industry and the miners would not have expected to move forward when it came to the subject of health care benefits.

By tracing the evolution of the health care benefit plans from the 1950 Coal Wage Agreement to the present it is apparent that the conduct of Petitioner, and companies similarly situated, resulted in the expectations in the minds of the miners that health care benefits would not terminate. The 1974 and 1978 Coal Wage Agreements merely formalized the course of dealing that had developed between the parties. Petitioner benefited from the 1974 and 1978 Agreements through its interlocking relationship with Eastern Associated, its wholly owned subsidiary and a signatory to the 1974 and 1978 Agreements. The Court should not allow Petitioner to avoid the responsibilities associated with the benefits it received by hiding behind the obsolete language of past agreements and attempting to pass on to the retired miners, the other coal operators such as the AEP Coal Companies, or the public at large the responsibility of funding critical health care benefits.

III. THE METHOD OF ASSIGNING BENEFICIARIES UNDER THE COAL ACT IS RATIONAL AND NONARBITRARY; THEREFORE, THE COURT SHOULD DEFER TO THE JUDGMENT OF CONGRESS.

Legislation affecting national economic policy is subject to a rational basis standard of review. If Congress acted in a rational way to achieve a legitimate legislative purpose, then the Court should defer to the judgment of the legislative and executive branches. *Gray*, 467 U.S. at 729. Ensuring health care benefits for coal industry retirees is a legitimate legislative purpose, and Congress has achieved that purpose through a rational determination that companies which profited from the labor of the retirees, rather than the other coal operators or the public at large, should bear the burden of this cost.

A. The Coal Act Assigns Beneficiaries In A Rational And Nonarbitrary Manner Based On The Employment Relationship Between The Beneficiary And The Coal Operator, Taking Into Consideration The Operator's Status As A 1978 National Bituminous Coal Wage Agreement Signatory.

The method developed by Congress to assign beneficiaries under the Coal Act is rational and nonarbitrary. Congress based the method of assignment on two factors. First, Congress considered the relationship between the coal operator and the beneficiary. Next, Congress looked to the coal operator's status as a signatory to the 1978 or later Coal Wage Agreements. The result of this two step approach is that whenever possible a beneficiary is

assigned to a coal operator for whom he or she worked. Then, if a beneficiary worked for both a 1978 (or later) signatory and for a non-1978 signatory, the 1978 signatory bears the burden of funding the benefits. 26 U.S.C. § 9706 (1992). Finally, Congress acted to ensure benefits to those "orphaned" miners who, through no fault of their own, worked for an employer who abandoned the business. For those miners, Congress established a general benefit fund to which all current or former coal operators still in business contribute. 26 U.S.C. § 9704 (1992).

B. Regulations Affecting National Economic Policy Come To The Court With A Presumption Of Constitutionality And Congress Is Under No Obligation To Select A Method Of Regulation More To The Liking Of Petitioner.

In *Gray*, the Court recognized that,

> [i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Gray, 467 U.S. at 729.

Therefore, as long as the Coal Act's method of assigning beneficiaries is both rational and nonarbitrary, Congress is under no obligation to choose a method more to Petitioner's liking. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 478 (1985) ("[W]e disagree with the Court of Appeals' conclusion that the Due Process Clause limited Congress' power

to choose a different reimbursement scheme in this case."). Congress chose to place the responsibility of funding retiree benefits on the coal operators that profited from the miners' labor, instead of placing the burden on other coal operators or the public at large. While Petitioner may not agree with that decision, Petitioner has failed to show that Congress acted in an irrational or arbitrary manner in selecting that method of funding.

C. The Retroactive Aspect Of The Coal Act Does Not Defeat The Presumption Of Constitutionality.

The beneficiary assignment provisions of the Coal Act are not unconstitutional merely because they act retroactively when applied to coal operators such as Petitioner for,

> [p]rovided that the retroactive application . . . is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Gray, 467 U.S. at 729.

While the Court stated in *Gray* that "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation . . . meets the test of due process", *Id.* at 730 (quoting *Turner Elkhorn Mining*, 428 U.S. at 16-17), the Court held that this "burden is met simply by showing that the retrospective application of legislation is itself justified by a rational legislative purpose." *Id.*

The Coal Act operates to guarantee that retirement benefits promised to coal miners are paid and seeks to do so in a rational manner that places the burden of funding those benefits, not on the public at large, but on those companies that benefited from the miners' labor and that created the expectation that benefits would not be terminated. That the Coal Act does so retroactively does not violate accepted Due Process principles because, to the extent possible, benefit responsibility to a miner follows the path of previous economic benefit received by – or through – that miner's former employer.

D. The Court Should Defer To The Collective Judgment Of Congress And The Executive Branch.

Legislation affecting national economic policy is due "strong deference" by the Court when Congress acts in a rational and nonarbitrary manner. *Gray*, 467 U.S. at 729. The method of assigning beneficiaries under the Coal Act is rational. Beneficiaries are assigned under the Coal Act based on their employment history tempered by whether the employer was a 1978 (or later) Coal Wage Agreement signatory. While Petitioner may not agree with this method, Petitioner failed to make a case for irrationality and arbitrariness in the courts below and has failed to persuasively suggest any reason the Court should not confirm the Coal Act as a proper exercise of the collective judgment of Congress and the executive branch.

CONCLUSION

The method of assigning beneficiaries under the Coal Act to companies that profited from association with the coal industry is a rational, nonarbitrary, and valid exercise of congressional power that is related to the expectations the beneficiaries developed through the conduct of their former employers. Since the actions of Congress were rational and nonarbitrary, the Court should defer to the judgment of the legislative and executive branches of Government and hold that the Coal Act does not violate the Due Process Clause or the Takings Clause of the Fifth Amendment, and should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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